

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES A. HARRIS,)	NO. 56495-1-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
ARLIE MASTERS and JANE DOE)	
MASTERS, husband and wife, and the)	
marital community comprised thereof;)	
and)	
Defendants,)	
)	
UNION PACIFIC RAILROAD)	Unpublished Opinion
COMPANY,)	
)	FILED: September 5, 2006
Respondent.)	
)	

COLEMAN, J.—James Harris sued his employer, Union Pacific Railroad Company, for injuries he sustained in his capacity as a locomotive engineer. The jury awarded Harris \$441,282, but found that he failed to mitigate his damages and reduced his award by \$381,282.

Harris appeals the trial court’s denial of his motion in limine to exclude evidence

of job opportunities in Portland, Oregon that would have required him to move from his home in Tacoma, Washington. Harris also assigns error to the trial court's refusal to include language in the jury instructions indicating that he had no legal duty to move to mitigate damages. Additionally, he assigns error to the trial court entering a judgment on the jury verdict as well as an order denying his motion for a new trial. The trial court's denial of Harris's motion in limine to completely exclude the Portland job evidence from trial was not necessarily an abuse of its broad discretionary powers. However, given the nature of the arguments related to the evidence, it was incumbent on the trial court to consider the admissibility of the evidence during trial and to issue limiting instructions to the jury regarding proper use of this evidence. Because there was no duty for Harris to move to mitigate his damages, the trial court erred by not instructing the jury regarding the permissible scope of the evidence. Therefore, we reverse and remand for a new trial to determine damages.

FACTS

Harris worked for Union Pacific for nearly thirty years in the Seattle-Tacoma region, most recently as a locomotive engineer. In February 2003, Harris injured his back when the locomotive handbrake wheel he was turning reversed direction suddenly and with substantial force. Although his doctor cleared Harris to return to full-time light duty work in July 2003, he was physically restricted, in part, to lifting no more than 25 pounds in his work activities. Union Pacific informed Harris in September 2003 that his position as a locomotive engineer could not accommodate such physical restrictions. Harris filed suit in September 2003 against Union Pacific under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51 for his

injuries resulting from the malfunctioning of the handbrake wheel. Admitting negligence, Union Pacific argued that Harris failed to mitigate his damages as an affirmative defense.

In the same communication that relieved Harris of his locomotive engineer position, Union Pacific offered Harris the services of a vocational rehabilitation counselor to help him return to work, either with Union Pacific or with outside employers. Harris did not respond to Union Pacific's offer of counseling services or to the specific communications sent by the vocational rehabilitation counselor. In two separate communications in March and October 2004, Union Pacific indicated to Harris the availability of opportunities to train for yardmaster positions in Portland, Oregon that could accommodate his medical restrictions. Harris did not respond. In January 2005, Harris completed a 60-hour course on real estate fundamentals with the goal of eventually obtaining a real estate agent's license.

Before the trial on damages, Harris filed a motion in limine to exclude evidence of out-of-state employment opportunities, reasoning that his legal duty to mitigate is limited and does not require relocating to distant, out-of-state locations. The court denied Harris's motion.¹ At trial, the court declined to revisit the motion in limine as well as to include jury mitigation instructions that specifically provided that Harris had no legal duty to move out of state for employment. The court reasoned that the motion in limine is an administrative tool of the courts and the parties should be able to rely on

¹ Judge Michael Fox ruled on the pretrial motion in limine. The remaining rulings were entered by Judge Michael Hayden, who presided over the trial.

such rulings. Additionally, the court reasoned that mitigation is generally an issue of reasonableness for the jury and that the proposed instructions would constitute improper commenting on the evidence.

The jury awarded Harris \$441,282 in damages, but reduced the award by \$381,282 for his failure to mitigate damages. Following the judgment on the verdict, Harris moved for a new trial, asserting, inter alia, errors in law pertaining to admitting evidence of out-of-state job opportunities and insufficient jury instructions regarding the limitations of the duty to mitigate damages. The court denied Harris's motion for a new trial. Harris appeals, asserting five assignments of error.

ANALYSIS

Motion in Limine

Harris argues that the court abused its discretion by denying his motion in limine because an injured employee is not required by law to pursue out of state work to reasonably mitigate damages. In his pretrial motion in limine, Harris asserted that the Portland evidence was clearly inadmissible because it was not relevant to his legal duty to mitigate damages and, additionally, would be highly prejudicial. In its opposition to Harris's motion in limine, Union Pacific asserted that the Portland evidence was relevant because it was "inextricably interwoven" into a pattern of Harris's unresponsiveness to its efforts to help him resume employment. Union Pacific cautioned the court against excluding the contested evidence because the court could not declare it to be clearly inadmissible, either under the pleadings or without the context of a well-developed record. In arguing against a preclusive ruling without the benefit of a well-developed record, Union

Pacific itself implicitly recognized the authority of the trial court to revisit this ruling as the trial progressed.

The trial court's decision to permit the presentation of the Portland job evidence was not necessarily an abuse of its broad discretion to grant or deny motions in limine. Prior to trial, a court will be careful not to exclude evidence that may be relevant to the arguments of the parties. But the court here had a continuing responsibility to weigh the relevancy of the contested evidence in the context of the trial, the possibility of prejudice, and to enact corrective measures, if necessary. Thus, the critical question becomes whether Union Pacific impermissibly used the Portland job evidence, permitting the jury to consider it as a direct factor of Harris's failure to mitigate his damages, beyond his legal duty.

Limits on Duty to Mitigate

Union Pacific asserts that mitigation is a factual matter for the jury based on a standard of ordinary care, state common law notwithstanding, and this court should not create an absolute restriction on the standard. Union Pacific further contends that the legal limitation on mitigation is a moot issue since the evidence was presented at trial merely to show that if Harris had responded to the offer, it could have offered him a comparable position close to home.

Appellate FELA cases support Harris's contention that a plaintiff is not required to relocate to fulfill his duty to mitigate damages. In Wagner v. Union Pac. R.R., 11 Neb. App. 1, 34, 642 N.W.2d 821 (2002), the court affirmed jury instructions that, in addition to describing the plaintiff's duty to mitigate, stated: "However, [Wagner] is not required to move from his current home

(Bill-Douglas-Casper, Wyoming area) to minimize or reduce his damages caused by the accident alleged” (alterations in the original). Similar to the present case, the defendant railroad in Wagner presented evidence at trial regarding numerous communications of job opportunities in various locations outside the plaintiff’s residential area and the plaintiff’s subsequent lack of response to the communications. Wagner, 11 Neb. App. at 32–33. Union Pacific argues that Wagner is inapplicable because it did not offer the Portland evidence to establish that Harris failed to mitigate because he did not take the Portland job, but to establish that Harris’s failure to respond cost him an opportunity closer to home. As discussed below, the record does not support Union Pacific’s contention that it offered the Portland evidence for the limited purpose it now suggests. Instead, the record indicates that the jury was left free to conclude that Harris failed to mitigate by not pursuing the Portland job opportunity.

In Edwards v. Atchison, T. & S.F. Ry., 291 Ill. App. 3d 817, 684 N.E.2d 919 (1997), the court affirmed the exclusion of evidence that the injured plaintiff could have transferred from a conductor to an engineer position to mitigate his damages. Although the trial court based the exclusion on a combination of several factors, one was the impact of relocation on the plaintiff and his family. Edwards, 291 Ill. App. 3d at 820. Although the facts of Edwards distinguish it from the present case, it is still persuasive given its emphasis on the potential job insecurity and familial upheaval implicit in relocating.

State common law applies to adjudication of FELA claims in areas where the statute does not specifically speak. See CONRAIL v. Gottshall, 512 U.S. 532, 541–42, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994)

(acknowledging the guiding role of common law for FELA claims); Eubanks v. CSX Transp., Inc., 223 Ga. App. 616, 478 S.E.2d 387, 390 (1996) (stating that state rules of procedure and practice, including rules of evidence, apply to FELA cases if there is no direct interference with substantive rights or defenses under FELA). Washington common law indicates there is no legal duty for Harris to relocate to Portland to mitigate his damages. In a wrongful discharge case, the Washington Supreme Court commented that the duty to mitigate is limited to “obtaining other similar employment in the same locality.” Holton v. Hart Mill Co., 24 Wn.2d 493, 497, 166 P.2d 186 (1946). The court has also considered the distance between a plaintiff’s home and a new job opportunity, compared to the distance to his old job, when analyzing whether the plaintiff’s failure to seek the new job opportunity was a failure to mitigate damages. Young v. Whidbey Island Bd. of Realtors, 96 Wn.2d 729, 735, 638 P.2d 1235 (1982). Finally, the court articulated in a noncompetition agreement case that “[t]he doctrine of avoidable consequences only requires the [former] [e]mployee to act reasonably”, which did not require the plaintiff to search for a similar position outside a 75-mile radius of his former job. Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 841, 100 P.3d 791 (2004).

Union Pacific’s argument that state law limitations on the duty to mitigate impermissibly burden the availability of its mitigation defense is unpersuasive. It relies on several appellate decisions granting railroad defendants new trials because the trial courts’ application of state common law nearly or completely removed the defendants’ abilities to mount the affirmative defense of failure to mitigate. Two of these cases involved the trial court’s refusal to give

mitigation instructions to the jury. Trejo v. Denver & R. G. W. R. Co., 568 F.2d 181, 184 (10th Cir. 1977); Kauzlarich v. Atchison, T. & S.F. Ry., 910 S.W.2d 254, 257–58 (Mo. 1995). A third case involved the application of the state’s worker’s compensation “sheltered employment” rule to a FELA case, excluding all evidence of the company’s efforts to place injured workers in appropriate employment positions. Yauch v. S. Pac. Transp. Co., 198 Ariz. 394, 10 P.3d 1181 (Ariz. Ct. App. 2000). Here, even with an explicit instruction stating that Harris has no duty to move to mitigate damages, Union Pacific would be able to assert its affirmative defense. It is entitled to an instruction on Harris’s duty to mitigate his damages. Additionally, Union Pacific can still present evidence of Harris’s failure to mitigate, including his persistent unresponsiveness to multiple vocational counselors and the passage of nearly two years before he enrolled in a real estate training course.

Union Pacific’s principle assertion is that a legal limitation on the duty to mitigate is immaterial because it did not present the Portland evidence to argue that Harris failed to mitigate damages by refusing to pursue the position. Rather, Union Pacific argues that it presented the evidence for the limited purpose of enabling Superintendent Kenneth Hunt to testify what local jobs would have been made available to Harris had he responded to the communication of the Portland opportunities. This argument is unsupported by the record. Counsel for Union Pacific questioned multiple witnesses regarding the Portland job opportunities, not just Hunt, the author of the original communications and the only witness able to offer Harris a local job. One of the witnesses was even questioned about the Portland job opportunities after Hunt had testified,

when the purported purpose of the evidence had been fulfilled.

Moreover, the record shows that Union Pacific repeatedly explored the higher wages of the Portland jobs and drew comparisons with Harris's former earnings, creating an effect that belies the asserted limited role of the evidence. On cross-examination, counsel for Union Pacific asked Harris to state the daily pay for the Portland jobs (\$225). Counsel then questioned Harris for a comparison with his income as an engineer: "So, the \$225 per day, a yardmaster trainee position, would have been more in terms of base pay than what you were making as yard engineer?" Verbatim Report of Proceedings (VRP) (Mar. 17, 2005) at 163. Immediately following Harris's affirmative answer, Union Pacific's counsel introduced Harris's earnings records and income tax documents as evidence and asked Harris to state what he had been earning in the years just prior to his injury. Counsel for Union Pacific repeated similar lines of questioning to other witnesses, such as Harris's vocational rehabilitation expert², Union Pacific Superintendent Hunt, and Union Pacific's vocational rehabilitation expert. The effect of this questioning was an emphasis on the Portland job as an attractive opportunity that paid more than Harris's former job, which is an altogether different purpose than establishing a foundation for further testimony from

² A juror's question submitted during the testimony of Harris's vocational rehabilitation expert, Merrill Cohen, indicates that the limited purpose of the Portland job evidence was not apparent during trial. A juror requested a distinction as to whether the Portland yardmaster jobs mentioned in Hunt's letters were formal job offers or merely announcements, a distinction that is irrelevant for the limited purpose of the evidence to establish a foundation for further testimony of a local job opportunity. The trial court responded that the current witness would not be able to answer the question, but other witnesses might be able to comment whether the letters communicated job offers or announcements.

Hunt as to what he would have offered had Harris responded to the Portland job opportunities.

In its closing arguments, Union Pacific continued to misuse the Portland job evidence. First, Union Pacific did not qualify the Portland job evidence as a mere foundation to presenting Harris's missed chance to hear about local job opportunities. Instead, it emphasized the availability of the Portland jobs, their superior wages and Harris's failure to pursue them, before mentioning the local job opportunities.

Dr. Hunt then writes him in March 2004 and October 2004 (Exhibits 271, 272), offering him yardmaster trainee positions. Yardmaster was a job paying \$225 - \$60,000 per year. Now it is [\$]250 per day. Does plaintiff respond—admittedly NO. . . . You heard Mr. Hunt—you communicate with me and I can work with you I've got a job here in Seattle that isn't assigned. . . . No Seattle job was offered because plaintiff did not communicate with Mr. Hunt.

VRP (Mar. 30, 2005) at 4–5. Additionally, Union Pacific argued that Harris's failure to respond to the Portland job cost him a local job opportunity. While it would have been courteous for Harris to respond to the Portland job opportunities to explain why he did not want to pursue them, Union Pacific's position incorrectly creates a duty for him to respond in order to discover the availability of a local position. Neither the testimony nor Union Pacific's closing statements suggested that Harris was not legally required to pursue the Portland job as a component of his duty to mitigate. While there is certainly other evidence of Harris's failure to mitigate damages, Union Pacific's presentation of this inadmissible evidence allowed the jury to incorporate his failure to pursue the Portland job as a direct component of his failure to mitigate.

Jury Instructions

Harris argues that jury instructions

limiting the duty to mitigate were necessary to cure any prejudice created by the presentation of the irrelevant Portland job evidence. Union Pacific argues that the jury instructions submitted to the jury were an accurate description of the ordinary care standard for the duty to mitigate. Further, Union Pacific argues that Harris's proposed jury instructions would have been an impermissible comment on the evidence.

This court reviews jury instructions de novo. Thompson v. King Feed & Nutrition, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). If an instruction contains an erroneous statement of the applicable law that prejudices a party, it is reversible error. Thompson, 153 Wn.2d at 453. The Washington Supreme Court summarized the standard of review for jury instructions in Keller v. City of Spokane, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002):

"Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." Bodin [v. City of Stanwood], 130 Wn.2d [726,] 732 [, 927 P.2d 240 (1996)]. Even if an instruction is misleading, it will not be reversed unless prejudice is shown. Walker [v. State], 67 Wn. App. [611], at 615[, 837 P.2d 1023 (1992)]. A clear misstatement of the law, however, is presumed to be prejudicial.

Error is prejudicial if it affects or presumptively affects the outcome of the trial. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

Here, jury instruction 16 sets forth the plaintiff's duty to mitigate:

You are instructed that the defendant Union Pacific Railroad Company is not liable for any of plaintiff's damages arising after his injury that are caused by plaintiff's failure to exercise ordinary care to avoid or minimize his damages. Defendant Union Pacific Railroad Company has the burden to prove the plaintiff failed to exercise ordinary care and the amount of damages, if any, that would have been minimized or avoided.

Ordinary care means the care that a reasonably careful person would exercise under the same or similar circumstances.

(Emphasis added.) The court denied Harris's proposed instruction that duplicated the above language, but attached the following limitation: "However, plaintiff is not required to move or commute long distances from his current home in Tacoma, Washington, to minimize or reduce his damages." Harris argues that he did not intend the statement to supplant the definition of ordinary care, but indicated that the definition could have instead been severed and included in a different instruction.

In the context of the Portland job evidence, jury instruction 16 was an incomplete statement of the law, resulting in prejudice. While the duty correctly involves ordinary care, "ordinary care" itself is not a precise description of the duty. Applicable laws narrow the scope of the duty from the outer limits of ordinary care to exclude a duty to pursue a job out of state. Thus, jury instruction 16 created a misleading mitigation standard, permitting the jury to find a failure to mitigate by Harris not relocating to Portland even though he had no legal duty to do so.

We reject Union Pacific's argument that the trial court correctly ruled that Harris's proposed jury instruction would have been an impermissible comment on the evidence. See VRP (Mar. 24, 2005) at 96. Washington Constitution, article IV, section 16 states: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "An instruction which does no more than accurately state the law pertaining to an issue in the case does not constitute an impermissible comment on the evidence by a trial judge under article 4, section 16." Tincani v. Inland Empire Zoological Soc'y, 66 Wn. App. 852, 861, 837 P.2d 640 (1992),

affirmed in part, reversed in part on other grounds, 124 Wn.2d 121, 875 P.2d 621 (1994).

Union Pacific relies on Harris v. Groth, 31 Wn. App. 876, 881–82, 645 P.2d 1104 (1982), in which the court affirmed the exclusion of proposed jury instructions that either elevated the status of an expert witness or duplicated an established instruction. The court reasoned that the controversial instructions “might [have] subject[ed] the trial judge to the charge of commenting on the evidence.” Harris, 31 Wn. App. at 881. Here, the proposed instruction would not have been a comment on the evidence by Harris standards because it was not repetitive of other instructions and would not have isolated or elevated any evidence offered by Harris. Moreover, Union Pacific’s case would not have been unduly discounted in the balance, as it asserts, because it could still establish a pattern of Harris refusing to respond to offers of help. To the contrary, the proposed instruction would have provided an accurate legal clarification that would have prevented the jury from finding failure to mitigate based on Harris’s refusal to pursue the Portland job.

Union Pacific asserts that the clarification of the duty to mitigate is not applicable because it introduced the Portland job evidence for a limited purpose only and not to directly establish a failure to mitigate. As we have explained, there is nothing to suggest to the jury that the evidence, as presented and argued, was offered for a limited purpose. Indeed, the jury was encouraged to view Harris’s failure to pursue the Portland job opportunity as evidence of his failure to mitigate. But, even assuming that Union Pacific presented the Portland job evidence for a limited purpose, the court would have been under a duty to include

Harris's proposed jury instructions, or an appropriately worded equivalent, to limit the evidence to its proper scope. Sturgeon v. Celotex Corp., 52 Wn. App. 609, 623–24, 762 P.2d 1156 (1988) (explaining that when evidence is admitted for a limited purpose only and the opposing party requests an appropriate limiting instruction, the court is under a mandatory duty to give the instruction).

The trial court declined to include Harris's proposed mitigation instruction because, *inter alia*, it wanted to avoid revisiting the motion in limine. Although one purpose of the motion in limine is judicial efficiency, the denial of a motion to exclude evidence is not in all circumstances a binding declaration that all such evidence is admissible, immune from further review during trial. This is particularly so when the scope and purpose of the evidence cannot be determined pretrial. Thus, in the circumstances here, the court had the responsibility to review the admissibility of the evidence in the context of the developing record. Subsequent rulings on evidence admissibility or jury instructions that contradict a motion in limine can therefore be appropriate at trial.

Because there is no duty to move to mitigate damages and Union Pacific did not offer the Portland job evidence for a limited purpose, it was incumbent on the court to clarify for the jury that Harris had no duty to move to Portland to mitigate his damages. Since the court did not submit such limiting instructions, the jury was free to consider Harris's failure to pursue the Portland job as a component of his failure to mitigate damages. Therefore, we reverse and remand for a new trial to determine damages.

Columen, J

WE CONCUR:

Cox, J.

Baker, J